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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-44

RICHARD CLEMMONS MORRISON

PETITIONER,

VERSUS

STATE OF FLORIDA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

# BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1973

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No._____

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RICHARD CLEMMONS MORRISON

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

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# BRIEF FOR RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Fourth District, to which the Petition for Writ of Certiorari is directed, is reported at 268 So.2d 207

(4DCA Fla. 1972). Petition for Writ of Certiorari filed in the Supreme Court of Florida, was denied on February 19,1972. The decision of the Supreme Court of Florida is reported at 274 So.2d 232. (Both opinions are contained in the Appendix of the Petition).

## JURISDICTION

The decision of the District Court of Appeal of Florida, Fourth District, entered on October 13, 1972, became final upon denial of Petition for Rehearing on November 14, 1972, and determination by the Florida Courts became final upon denial of Petition for Rehearing by the Supreme Court of Florida on March 22,1973.

Petitioner invokes jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3) and Rule 19 (1)(a) of the Rules of the

Supreme Court of the United States.

## QUESTION PRESENTED

Was Petitioner's Right of Due Process of Law, denied by the trial court when it denied Petitioner's motion for withdrawal of his plea of nolo contendere based upon a breach in negotiations of such a plea.

## STATEMENT

On September 8, 1970, an amended information was filed in the Court of Record, Broward County, Florida, charging Petitioner with breaking and entering with intent to commit grand larceny (Appendix B of petition). The case was scheduled for trial on May 3, 1971.

At a hearing held on April 29, 1971, Petitioner's counsel represented to the trial court that a plea had been negotiated

with members of the prosecution staff. This compromise had been accepted by Petitioner. However, Mr. Geiger, Broward County Solicitor, had reneged on the agreement. Petitioner's counsel opined that there was law to the effect that he could compel the prosecution to honor the accord. (Transcript of Hearing of April 29, 1971, pp.3-5).

The bargain between the prosecution and Petitioner was that the later would enter a nolo contendere plea to Breaking and Entering with the intent to commit Petty Larceny. The trial judge explained the maximum penalty for this lesser included offense and remarked that the agreement was that the State would recommend a sentence no greater than two years, with the opportunity open to Petitioner to discuss further reduction of sentence with the Court. The agreement also included a

pre-sentence investigation. The judge expressed his approval of the agreement. (Transcript of Hearing of April 29,1971, pp.7-9).

Assistant County Solicitor, Joseph Hand, explained that he had advised Petitioner's counsel the day before, that the County Solicitor could not honor the bargain arrived at. Mr. Geiger then explained his reasons for reneging and not participating in such accord. (Transcript of Hearing of April 29,1971, pp.10-16).

Thereafter, Petitioner's counsel requested that a continuance not be charged to him and indicated he would take the matter to the governor. At that time, the trial judge stated he still felt that the prosecution had an obligation to comply with the negotiation entered into, and which the court approved. He remarked that

the court would force compliance with the plea agreement if the plea were still sought by Petitioner. The assistant County Solicitor protested that this could not be done because the State would not honor the agreement, and the plea would not be to the offense charged. (Transcript of Hearing of April 29,1971, pp.17-18). The trial judge then admonished the prosecution that they were trying to rescind the agreement, that contract law applied, and that the action of the prosecution would prevent good - faith plea bargaining. The court repeatedly stated that the agreement was both valid and just, and should have been adhered to. (Transcript of Hearing of April 29,1971, pp.19-24). Upon the representation of the prosecution and Petitioner, that the trial judge had no authority to enforce the plea negotiations, a continuance

not chargeable to Petitioner was granted. (Transcript of Hearing of April 29,1971, pp.23 and 25).

On September 13,1971, Petitioner entered a plea of nolo contendere to the charged offense. (See Appendix A of Respondent).

At the sentencing hearing on January 5, 1972, Petitioner's counsel moved to withdraw the nolo contendere plea on the sole ground that the prosecution had not honored the negotiated plea agreement. The trial judge commented that he had previously stated that the agreement would be enforced, not withstanding the State's position. (Transcript of Hearing of January 5,1972, pp.2-5). It was the court's opinion that since he had permitted Petitioner to enter a plea some six months before, the court did not think it proper to permit another plea change. Petitioner

had been permitted to remain on bond, and the judge, six months previous, advised him that a two-year sentence would be imposed.

When the Petitioner's counsel mentioned that a two-year ceiling had been agreed upon, with an opportunity to negotiate a further reduction, the court reminded him that he had been informed that the sentence would be two years. (Transcript of Hearing of January 5, 1972, pp.5-6). The court had examined Petitioner's prior record, which showed numerous arrests, and one felony conviction some ten to fifteen years before. (Transcript of Hearing of January 5, 1972, pp.6-7).

The court was under the impression, supported by the record, that the plea had been made to the charged offense. (Transcript of Hearing, Jan.5,1972, pp.7-12).

He then accepted again the nolo contendere plea to the lesser included offense, and sentenced Petitioner to a two-year term. (Transcript of Hearing of Jan.5,1972, pp.13-14).

ARGUMENT

It is well settled in both the State and Federal courts, that there is no absolute right to withdraw a guilty plea before the imposition of sentence. The right to do so is within the sound discretion of the trial court. Unless that discretion is abused, there should not be a reversal. See Kirshberger v. U.S., 392 F.2d 782 (U.S. 5 Cir.1968), U.S. v. Giuliano, 348 F.2d 217 (U.S. 2nd Cir.1965), Stapelton v. State, 239 So.2d 140 (1DCA Fla.1970), Stovall v. State, 252 So.2d 376 (4DCA Fla. 1971).

Because of the aforementioned discretionary power bestowed upon the trial judge, the burden of proof falls squarely upon a defendant to show an abuse of such authority. See U.S. v. Giuliano, supra, Smith v. U.S., 359 F.2d 481 (U.S. 8 Cir. 1966). For concurring State authority, please see Ostermann v. State, 183 So.2d 873 (2DCA Fla. 1966), Morgan v. State, 142 So.2d 308 (2DCA Fla.1962). In the case sub-judice, the burden upon Petitioner is heavier because of the nature of his plea.

One of the most important characteristics of the plea of nolo contendere, which distinguishes it fundamentally from the plea of guilty, to which it is so frequently linked by courts, is that its acceptance by the court is not a matter of right, but is entirely within the

discretion of the court. See U.S. v. Kiger, 421 F.2d 1397 (U.S. 2nd Cir.1970), Lott v. U.S., 309 F.2d 115 (U.S. 5 Cir.1962). It then follows, a fortiori, that because of the court's discretion in accepting no contest pleas, a greater latitude is afforded to the trial judge when entertaining a suggestion of withdrawal of such a plea, compared with withdrawal of a guilty plea.

It is the State of Florida's position that an examination of the record proper will demonstrate to this Honorable Court that Petitioner has failed to challenge the aforementioned judicial discretion, as the trial judge's actions were of a sound nature.

In the case at bar, the sole ground for Petitioner's motion to withdraw his nolo contendere plea was that the State reneged on its plea-bargain agreement. It is clear

that Petitioner had not shown good cause for vacation of his plea, because he entered it, counseled, after the plea agreement had been breached by the State. In addition to not showing the trial judge good cause, the record is devoid of any indication that Petitioner had a meritorious defense. See U.S. v. Youpee, 419 F.2d 1340 (U.S. 9 Cir. 1969), Leand v. U.S., 457 F.2d 1208 (U.S. 9 Cir.1972), McCall v. State, 186 So. 510 (Fla.1939). What the record does reflect however, is Petitioner's counsel's statement in open court on January 5, 1972, that he was guilty of the lesser included offense to which the plea bargaining established that Petitioner would enter his plea. (Respondent's Hearing of Jan. 5,1972, pp.11 and 12). Under these circumstances it cannot be said that the trial court abused its discretion.

Petitioner maintains that he should have been allowed per se to withdraw his nolo contendere plea after the prosecution breached the accord. In Santobello v. New York, 404 U.S. 257 (1971), this Court expressly recognized that specific enforcement of plea agreements breached by the State is proper. In the case at bar, as outlined in the "Statement", the trial court properly, specifically enforced the plea bargain which the prosecution attempted to repudiate. Since Petitioner's sole ground for orally moving to withdraw his prior plea was that the State had reneged on its prior agreement, and the trial court's action insured that the agreement was fulfilled, how can he now be heard to complain? See Commonwealth v. Alvarado, 276 A.2d 526 (Penn. 1971) and Schoultz v. Hocker, 469 F.2d 681 (U.S.

## CONCLUSION

On the basis of the foregoing argument and legal authority, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondent in Opposition has been furnished to Honorable Allen Kornblum, Attorney for Petitioner, 19 West Flagler Street, Miami, Florida 33130, by mail this 24th day of October, 1973.

FRANK B. KESSLER
Assistant Attorney General

## Appendix A

## CHANGE OF PLEA

At this time, Mr. Rich on behalf of the Defendant, moved the Court to allow the Defendant to withdraw his plea of not guilty heretofore entered and enter a plea of Nolo Contendere to the Amended Information herein. After due consideration, the Court granted the Motion, whereupon, the Defendant withdrew his plea of not guilty heretofore and entered a plea of Nolo Contendere to the amended Information herein. Whereupon the Court proceeded as follows:

> You, Richard Clemmons Morrison, having pleaded Nolo Contendere to the crime of Breaking and Entering with Intent to Commit a Felony, to-wit: Grand Larceny, the Court now adjudges you to be guilty of said crime. It is,
>
> Ordered and Adjudged that imposition of sentence in this case be, and the same is hereby deferred until January

5, 1972, and you are hereby released on the same bond pending a Pre-Sentence Investigation by the Florida Parole Commission.

JAMES M. REASBECK,
Judge